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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PAMELA JEAN GRUBB, Defendant and Appellant.	E054411 (Super.Ct.No. BAF005730) OPINION

APPEAL from the Superior Court of Riverside County. Richard T. Fields, Judge. Order affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Christine Levingston Bergman, Deputy Attorney General, for Plaintiff and Respondent.

Following two periods during which defendant was found to be incompetent to stand trial and was treated at Patton State Hospital, the trial court ordered defendant held

at Patton pending a hearing on whether her competency had been restored for a third time. Defendant appeals from the trial court's order of August 25, 2011, contending that, pursuant to Penal Code section 1370, subdivision (c),[1] her pending criminal case should be dismissed and she should be released from custody. We disagree with defendant and affirm the trial court's order.

FACTS

Defendant was arrested on October 11, 2007 and remained in custody until August 25, 2011. She was charged after October 11, 2007, with two counts of violating section 288, subdivision (a) and one count each of violating sections 289, subdivision (d), 269, subdivision (a)(4) and 269, subdivision (a)(5), along with an allegation that she victimized more than one person (§ 667.61, subd.(e)(5)). In all, defendant faced two life terms and a 15-year-to-life term under the provisions of the One Strike Law. On February 29, 2008, she was found incompetent to stand trial and she was ordered committed to Patton State Hospital on March 28, 2008. She was transported to Patton on June 16, 2008. On February 13, 2009, she was returned to jail. She was found competent to stand trial and criminal proceedings were reinstated on February 13, 2009. Criminal proceedings were suspended for a second time on May 27, 2009. On October 13, 2009, she was found, for a second time, to be incompetent to stand trial. Defendant was committed to Patton State Hospital a second time on November 10, 2009. Defendant was transported to Patton on February 19, 2010. On June 23, 2010, defendant was returned to

[1] All further statutory references are to the Penal Code unless otherwise indicated.

jail. On November 9, 2010, she was found competent to stand trial and criminal proceedings were reinstated for a second time. Criminal proceedings were suspended for a third time on January 14, 2011. Defendant was found, for a third time, to be incompetent to stand trial on February 28, 2011. However, before the court below committed defendant to a treatment facility, it, and the parties, agreed on April 5, 2011, that defendant had already been committed to Patton for over three years. According to section 1370, subdivision (c)(1), "At the end of three years from the date of commitment . . . a defendant who has not recovered mental competence shall be returned to the committing court." "Once an incompetent defendant has been committed for the maximum commitment period, if it appears to the court that the defendant is 'gravely disabled,' the court shall order the conservatorship investigator to initiate a 'Murphy conservatorship.' [Citations.] The court may impose a Murphy conservatorship if it finds that defendant, as a result of a mental disorder, "'represents a substantial danger of physical harm to others.'" [Citations.] Alternatively, the court can dismiss the charges and order the defendant released, without prejudice to the initiation of alternative commitment proceedings under the Lanterman-Petris-Short Act. [Citations.]" (*People v. Reynolds* (2011) 196 Cal.App.4th 801, 806, fn. omitted, (*Reynolds*), [Fourth Dist., Div. Two].) Therefore, on that date, the court referred the matter to the Public Guardian's Office to evaluate defendant for a conservatorship and the Public Guardian was subsequently appointed as conservator. On June 30, 2011, the court granted defendant's motion that she be released from jail and housed at an Inpatient Treatment Facility (ITF), pursuant to section 1370, subdivision (c). On August 17, 2011, the Riverside County

Mental Health Director certified that defendant had been under treatment at ITF since June 2, 2011, and she was presently competent to stand trial (and she was no longer gravely disabled). On August 25, 2011, before the hearing at issue, the Public Guardian's ex parte application to terminate defendant's conservatorship was granted on the basis that defendant was no longer gravely disabled.

In a written motion,[2] defendant contended first that more than a total of three years had elapsed between the time criminal proceedings were suspended and the time they were reinstated for the first two periods of her incompetency and the date criminal proceedings were suspended for the last time and the day of the hearing on the motion.[3] Although she correctly noted that an issue was "how does one calculate the date from which the time to bring the defendant to competency . . . runs[,]"she asserted that under the compulsion of this court's opinion in *Reynolds*, "a defendant is only entitled to post-commitment credits" [4] or, in other words, the time ran from the day she was committed to

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[2] The motion references a motion by the People and the People's motion is referred to during the hearing, however, no such motion appears in the Clerk's Transcript.

[3] Although in the first chart defendant submitted to the court below as part of her written motion, she identified the date she asserted she had been released to the Public Guardian, in her calculation of the number of days that "ha[ve] been spent with proceedings suspended due to [her] incompetency," she includes the time following her asserted release to the Public Guardian until the day of the hearing on the motion. Additionally, the date specified in defendant's motion as the day she was released to the Public Guardian was, in actuality, the day the trial court first ordered that defendant not be released from jail to anyone other than the Public Guardian. Defendant was not actually released to the Public Guardian until June 30, 2011.

[4] At the hearing on the motion, defense counsel said, "I'm aware that *Reynolds* is not counting just when proceedings are suspended due to incompetence . . . ."

treatment to the day the court reinstated criminal proceedings for the first two periods of incompetency and from the date she was released to the Public Guardian to the date of the hearing for the last period. She offered no explanation then, and offers none here, as to why these last two dates should be the operative ones. According to her calculations, these combined periods totaled 829 days.

At the hearing, the trial court observed that it was bound by *Reynolds* and 829 days did not add up to three years. The court denying defendant's request that she be released on her own recognizance, it set bail at $1,000,000, due to the severity of the charges, ordered that criminal proceedings were still suspended and that defendant be housed at Patton pending the outcome of the hearing to determine if her competency had been restored.

ISSUE AND DISCUSSION

In *Jackson v. Indiana* (1972) 406 U.S. 715, 738 the United States Supreme Court held that a "person charged . . . with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the forseeable future." In *In re Davis* (1973) 8 Cal.3d 798, 801, the California Supreme Court held, "[W]e adopt the rule of the *Jackson* case . . . . Unless such a showing of probable recovery is made within this period, defendant must either be released or recommitted under alternative commitment procedures." The three year limit on a commitment embodied in section 1370, subdivision (c) assures that a

defendant's commitment will be within the parameters of *Jackson* and *Davis*. (*In re Mille* (2010) 182 Cal.App.4th 635, 643 (*Mille*).)

In *In re Banks* (1979) 88 Cal.App.3d 864, 866, 867 (*Banks*), [Fourth Dist., Div. Two], the defendant, who had been found guilty of a misdemeanor, which carried a maximum sentence of six months, was declared incompetent before the sanity phase of his trial commenced. Under the provisions of section 1370, subdivision (c), he could not be confined in the state hospital for longer than six months. (*Banks*, at pp. 866-867.)[5] Defendant had already spent over 60 days in jail[6] and after spending additional time in a state hospital, *for a total of six months*, he petitioned this court for a writ of habeas corpus to be released. We rejected the defendant's contention that he was entitled to add the time he spent in jail before being committed to the state hospital to the time he spent in the state hospital for purposes of calculating the maximum duration of his commitment under section 1370, subdivision (c). We agreed with the prosecutor that the "time of commitment" to the state hospital started the clock running for the maximum duration. (*Banks*, at p. 867.) We pause in our discussion of *Banks* at this point to call attention to the fatal flaw in defendant's argument below.[7] As already stated, defendant contended

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[5] Section 1370, subdivision (c) provides that the maximum duration of commitment is either the duration of the maximum sentence for the most serious offense charged or three years, whichever is shorter.

[6] We concluded this occurred because of defendant's indigence.

[7] Appellate counsel for defendant makes the same error by asserting that *Bank*'s second holding that the defendant there was entitled to credit against his maximum duration of commitment for his precommitment time was a "rejection" of its first holding

[footnote continued on next page]

that the maximum duration of her commitment under section 1370, subdivision (c) included *all the time she spent in jail* in addition to the time she spent in treatment at Patton and IFT. Although she couched it in terms of a credit issue under *Banks,* it was not. It was an issue, as defendant clearly framed it in her written brief below, but then failed to develop, of when the commitment time began for purposes of the maximum duration of commitment under section 1370, subdivision (c) and when it ended. She argued that it began the day she was arrested and ended the day of the hearing. *Banks* clearly holds that this is incorrect. Rather, as *Banks* says, it is the actual commitment time. The fact that our opinion in *Reynolds* does not even set forth dates for anything other than the defendant's actual time in treatment (see *Reynolds, supra*, 196 Cal.App.4th at p. 805) supports this position, as does the purpose for the commitment, which is to provide a "meaningful opportunity for the defendant to make progress towards recovery of mental competence." (*Mille, supra,* 182 Cal.App.4th at p. 645, accord, *People v. Waterman* (1986) 42 Cal.3d 565, 570.) Such an opportunity cannot exist while a defendant sits in jail, without treatment, awaiting proceedings antecedent to trial, regardless whether she has been declared incompetent at any point during that time. Aside from her custody credit argument, discussed below, defendant cites no authority holding that the maximum duration of commitment under section 1370, subdivision (c) is anything other than the total of the actual periods during which she was in Patton and ITF

[footnote continued from previous page]
that "the time of commitment started the clock running" for purposes of section 1370, subdivision (c). They were separate issues.

receiving treatment. Therefore, we agree with the People that defendant has spent even less that the 829 days she claimed in her written motion and at the hearing because she included in that calculation many days she sat in jail, without receiving treatment, some after being declared incompetent by the trial court and some after being returned from Patton.

As a second issue, the defendant in *Banks* contended that he was entitled to section 2900.5 credits towards the maximum duration of his commitment for the time he spent in jail before the commitment. (*Banks*, *supra*, 88 Cal.App.3d at p. 867.) We concluded that "[d]enial of credit for precommitment confinement results in discrimination on the basis of wealth in violation of state and federal equal protection guaranties because indigent defendants who are unable to obtain release on bail will serve precommitment jail time and so will be confined longer than wealthier defendants who are released on bail prior to their incompetency commitments. [Citations.] [¶] . . . [¶] For purposes of equal protection, we can perceive no logical distinction between the application of credit against an actual sentence and the application of credit against a sentence term used to measure the maximum permissible duration of an incompetency commitment. . . . [¶] Pretrial confinement of incompetent defendants beyond the maximum period for the charged offense violates basic notions of fairness and due process because the state has no legitimate interest in continued confinement of an incompetent accused *beyond the maximum sentence term for the charged offense*." (*Id*. at pp. 867, 869, fn. omitted, italics added.) We pointed out that when the defendant spent six months of combined time in jail and in the state hospital, he became "immune" from further punishment in the event

his competency would be restored and he had gone on to be sentenced for his conviction. (*Id.* at p. 870.) We concluded that the state had no valid interest in continuing to prosecute such a person. (*Ibid*.) Finally, we observed, "[I]t is . . . unfair to deprive the incompetent defendant of his liberty for a period in excess of the maximum sentence for the charged offense, without the benefit either of a trial on the issue of guilt [(in this case, a trial on his plea of not guilty by reason of insanity)] or of the commitment procedures applicable to the nondefendant mentally ill." (*Id.* at p. 871.)

In *Reynolds*, the defendant contended that the court erred in not applying his precommitment custody credits when calculating the maximum duration of his commitment. (*Reynolds*, *supra*, 196 Cal.App.4th at p. 803.) Of the second holding in *Banks*, we said, "This was consistent with the legislative purpose of enacting [the section providing for presentence credits] 'to eliminate the unequal treatment suffered by indigent defendants who, because of their inability to post bail, served a longer overall confinement than their wealthier counterparts.' [Citation.] [¶] . . . [¶] The instant case is distinguishable from *Banks* in that defendant's maximum commitment term is not measured by his maximum potential criminal sentence [but by] . . . three year[s]. . . . [¶] . . . The equal protection rationale relied on in *Banks* . . . is inapplicable here where the maximum competency term is the three-year limit . . . . In enacting section 1370, the Legislature determined that the three-year confinement period was a reasonable maximum period of time to hold those found incompetent, in an attempt to bring them to competency. [Citation.] . . . [¶] Unlike in *Banks* . . . here, disregarding custody credits does not result in any disparity between commitment by those capable of posting bond

and those incapable of doing so because of indigency, since a defendant's commitment term is not based on the length of the defendant's potential criminal sentence. Indigent defendants are not required to spend more time in confinement than their wealthier counterparts since indigent defendants' custody credits would remain applicable to their criminal sentences in the event [they are restored to competency]. [¶] . . . [B]ecause [defendant's potential] sentence is longer than the maximum three-year commitment period, defendant's time in custody for committing a crime would be the same as that of a defendant who has posted bail and has no precommitment custody credits. This is because defendant is entitled to apply his precommitment custody credits against his custody time serving his criminal sentence, if [restored to competency], tried and convicted. We thus conclude that nonapplication of precommitment custody credits to defendant's three-year commitment period does not violate his equal protection rights." (*Reynolds* at pp. 807-809.)

Below, defendant's response to our holding in *Reynolds* was that it was not yet final, and, therefore, the trial court should not rely on it. She can no longer make that argument. Nevertheless, she asserts that it was wrongly decided. She provides no persuasive argument why this is so.

DISPOSITION

The order is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.